IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2570 of 1999

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI
and
Hon'ble MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

UNISILK

Versus

COMMISSIONER OF CUSTOMS

Appearance:
Mr.Kamal Trivedi & Mr.Rakesh Gupta for
M/S TRIVEDI & GUPTA for Petitioner
Mr.Akshay Mehta, for the respondents.

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI
and
MR.JUSTICE A.R.DAVE

Date of decision: 18/09/2000

ORAL JUDGEMENT (Per D.M.Dharmadhikari, CJ)

The petitioner is a company at Hong Kong and is

an exporter of raw silk to various countries including India.

2. By this petition, under Article 226 of the Constitution of India, the petitioner company seeks quashing of action of seizure and confiscation of its goods (quantity of Mulberry Raw Silk sent by ship and received at Kandla Port in the State of Gujarat) under order dated 16.2.99, 17.2.99, 1.3.99 and 8.3.99 for various consignments (collectively annexed as Annexure G to the petition).

3. The impugned action of seizure is taken and the orders of confiscation are passed under Section 110 and Section 124 of the Customs Act, 1962 (hereinafter referred for brivity as the `Act').

4. The necessary facts leading to the seizure and confiscation of the alleged illegally imported goods are as under:-

5. Between January to February 1998, the petitioner company entered into contracts with various Indian buyers for shipment of 100% Mulberry Raw Silk whereunder different consignments under 31 Bills of Lading were shipped from Hong Kong & Singapore. In the Bills of Lading the consignor was the petitioner and the consignee was " To order"of the petitioner, as notified parties were the respective Banks together with respective Indian buyers. About 51.300 M.T. of the aforesaid goods came to be landed at Kandla Port in March 1998, which were to be cleared by Indian importers, viz.: Usha Soap & Chemicals, Calcutta, R.K.Sports, Calcutta, Paramount International, Calcutta and Sankalp Lefabs, New Delhi. The above named Indian importers/buyers did not get the documents sent by the petitioner to their Bankers, retired. The said Indian parties did not make the requisite payment to their Bankers by way of sale consideration of the aforesaid goods and therefore the petitioner had to recall the documents.

6. The petitioner company wrote to the shipping company to amend the Bills of Lading so that the new buyers who became ready to purchase the above mentioned goods can take the release of the documents from the Bank. The shipping company amended the Bills of Lading as desired by the petitioner company but the Custom Authorities refused to grant any permission with regard to the goods. The Custom Authorities seized the goods received on 27.5.98 at Kandla Port without any intimation to the petitioner company.

7. The petitioner company on 28.5.98 made an application to the Commissioner of Customs, Kandla to permit the reshipment of the aforesaid goods.

8. The Custom Authorities did not send any reply to the petitioner company but instead issued notices and summons to the above named importers/buyers. The petitioner again repeated its request in writing for permitting re-shipment of the goods. Having received no reply from the Custom Authorities, the petitioner filed 4 writ petitions for 4 different consignments of the goods in this Court. The petition was registered as SCA No. 8203, 8206, 8209 and 8210 all of 1998. The Division Bench of this Court passed a common order on 15.10.98 in the aforesaid petitions directing the Commissioner of Customs (respondent no.1 herein) to decide the pending applications of the petitioner company for permitting re-shipment of the goods. The necessary order on the pending applications were directed to be passed within a period of four weeks from the date of passing of order i.e. 15.10.98. Instead of first deciding the applications of the petitioner company for reshipment of the goods, as directed by the Division Bench of this Court in the cases (Supra), the Commissioner of Customs on 23.11.1998 issued notices to the Indian buyers named in the Bills of Lading proposing to confiscate the aforesaid goods and impose penalty. No notice of the above proposed action of confiscation was given to the petitioner company although it had already approached the Commissioner (respondent no.1) in writing by its application and had obtained orders from the Division Bench of this Court of consideration of his pending application for reshipment.

9. On 20.11.98, the petitioner received a copy of the order dated 14.12.1998 passed by the Commissioner of Customs pursuant to the order of the Division bench in the case of the writ petition of the petitioners (Supra). By the aforesaid order dated 14.12.98, the Commissioner rejected the prayer in the applications of the petitioner company for grant of permission for reshipment of the goods. In his order dated 14.12.1998, the Commissioner without notice and hearing to the petitioner company recorded his reasons and came to the conclusion that 100% Mulberry Raw Silk was imported without a valid licence and the import was therefore illegal and unauthorised. The Commissioner further held that there is no provision under the Customs Act, 1962 to grant permission to the exporter for reshipment of the goods which are found to have been imported illegally and unauthorisedly.

10. After receiving the order dated 14.12.1998 whereby the Commissioner refused permission to the petitioner company for reshipment of the goods, the petitioner filed this petition on 9.4.1999.

11. Before filing of this petition, without any notice or knowledge of the petitioner company, the Commissioner by impugned orders dated 16.2.99, 17.2.99, 1.3.99 and 8.3.99 (marked collectively as Annexure G) confiscated all the goods of the petitioner company received under various consignments. This Court on 12.4.1999 granted interim relief to the petitioner by restraining the respondent Custom Authorities from dealing with, disposing and/or alienating and/or selling the aforesaid goods till the finalisation of the captioned writ petitions. The petitioner derived knowledge of passing of the impugned order of confiscation during the pendency of the petition only when the facts and the orders were disclosed by reply affidavit filed on 3.8.1999. The impugned orders of confiscation were obtained and thereafter annexed to the writ petition.

12. Learned Counsel Shri Kamal Trivedi appearing for the petitioner company assails the action of the Custom Authorities of seizure and confiscation of its imported goods on the ground that the action is shockingly arbitrary and against the provisions of the Act and the principles of natural justice. It is submitted that the petitioner company as an exporter is admittedly the owner of the goods imported as the delivery of the consignment was not taken by the Indian buyers on arrival of the goods at Kandla Port as they did not retire the documents from the Bank. No action of seizure or confiscation of goods could have been taken by the Custom Authorities without notice or grant of opportunity of hearing to the petitioner company, which although a foreign based company, had approached the Custom Authorities by way of an application and filing a writ petition in this Court.

13. The second ground urged by the Learned Counsel on behalf of the petitioner company is that service of notice for grant of opportunity of hearing to the owner of the goods, before passing an order of confiscation, is a mandatory requirement of law in consonance with the principles of natural justice under Section 124 of the Act. Failure on the part of the Custom Authorities to do so within six months of the seizure of the goods, the petitioner company was entitled to return of the goods seized in accordance with Section 110(2) of the Act.

14. Reliance is placed on Asst. Collector of Customs Vs. Charan Das Malhotra reported in AIR 1972 SC 689, Ambalal Morarji Soni Vs. Union of India reported in AIR 1972 Guj 126 and Garden Silk Mills Ltd. & Anr Vs. Union of India & Ors. reported in 1999 (34) RLT 833 (S.C.), Union of India Vs. Sampat Raj Dugar reported in 1992 (58) E.L.T. 163 (S.C.)

15. Learned Standing Counsel for the Department Shri Akshay Mehta made strenuous efforts to support the action of the authorities. It is submitted that the Custom Authorities made investigation and inquiry into the nature of import of the quantity of silk and the investigation/inquiry is still in progress. The investigation so far made by the Department shows that all the consignees named as Indian buyers were found to be fictitious. It was thus a case of illegal import of Raw Silk and, therefore, there was no requirement in the Customs Act to hear the exporter or the owner before the seizure and confiscation of the illegally imported goods. It is also submitted that there is no provision in the customs Act to permit the exporter to reship the goods when they are found to have been illegally imported.

16. After hearing the Learned Counsel appearing for the parties & on going through the contents of the impugned orders of confiscation passed and the orders passed pursuant to the earlier order of the Division Bench of the Court, we have come to a definete conclusion that there is a fatal procedural infirmity in the action of the Custom Authorities as they failed to give notice and opportunity of hearing to the exporter who is undisputedly the owner of the goods.

17. The provisions of Section 110 authorising the seizure of goods, as a step for confiscation, in its relevant sub-sections (1) and (2) read as under:-

"Section 110. Seizure of goods, documents and things - (1) If the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods:

Provided that where it is not practicable to seize any such goods, the proper officer may serve on the owner of the goods an order that he shall not

remove, part with, or otherwise deal with the goods except with the previous permission of such officer.

1.A. .....
1.B. .....
a. ....
b. ....
c. ....
1.C. ......

2. Where any goods are seized under sub-section (1) and no notice in respect thereof is given under clause (a) of section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized:

Provided that the aforesaid period of six months, may on sufficient cause being shown, be extended by the Commissioner of Customs for a period not exceeding six months."

Section 110(2) (quoted above) requires service of a notice in accordance with Section 124 of the Act which reads as under:-

"Section 124. Issue of show cause notice before confiscation of goods etc. - No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person -

(a) is given a notice in writing informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;

(b) is given an opportunity of making a representation in writing

within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and

(c) is given a reasonable opportunity of being heard in the matter:

Provided that the notice referred to in clause (a) and the representation referred to in clause (b) may, at the request of the person concerned be oral."

18. It was not seriously disputed that so long as the Bills of Lading and other documents were not retired from the Bank by payment of sale consideration by the Indian buyers, the goods continued to belong to the exporter i.e. the petitioner which is foreign based company. The investigation made by the Custom Authorities disclose that there was an attempt to illegally import the goods as all the Indian buyers were found to be fictitious and their whereabouts were not known. That there was an attempt on the part of the exporter to illegally import the goods was a conclusion which could not been have arrived at exparte without notice and grant of opportunity of hearing to the exporter. It is not the case of the Department that the exporter, who is a foreign based company, was not available for grant of opportunity. As the facts have been stated above, the petitioner company had been repeatedly approaching in writing and through its representations the Custom Authorities to grant them permission for reshipment of the goods or dispose of the goods to other Indian buyers possessing a valid import licence for the goods. The petitioner company had also filed a writ petition in this Court and obtained an order directing the respondents to consider and pass orders on its pending applications for grant of permission for reshipment of goods. Ignoring all the above facts, the Custom Authorities felt content by sending notices only to the consignees of the goods which according to the department's own case, based on their investigation, were non-existent and fictitious parties. In such a situation, it was more necessary and infact a mandatory requirement of Section 124 of the Act to have sent notice and grant opportunity of hearing to the exporter who was admittedly the owner of the goods received and seized at the Kandla Port. In our

considered opinion, non-service of notice for grant of opportunity to the petitioner company as owner of the seized goods was a fatal infirmity and the confiscation ordered is in contravention of Section 124 of the Act. The illegaility has the consequence of making the petitioner entitled to the return of the seized goods in accordance with Section 110(2) of the Act. It is difficult for the Custom Authorities to get out of the legal provision contained in Section 124 which, according to us, is of a mandatory nature and based on principles of natural justice. We find that consequence of failure on the part of the Custom Authorities to follow the procedure of giving notice to the owner of the goods in accordance with Section 124, as statutorily provided in Section 110(2) is to make the person or owner, whose goods were seized, entitled to the return of the goods. We are supported in our conclusion by the following observations of the Supreme Court in the case of Sampat Raj Dugar (Supra):-

"The exporter is outside the country, while the importer, i.e., the licensee is in India. It is at the instance of the licensee that the goods are imported into this country. Whether or not he is the owner of such goods in law, the Imports (Control) Order creates a fiction that he shall be deemed to be the owner of the such goods from the time of their import till they are cleared through customs. This fiction is created for the proper and effective implementation of the said order and the Imports and Exports (Control) Act. The fiction however cannot be carried beyond that. It cannot be employed to attribute ownership of the imported goods to the importer even in a case where he abandons them, that is, in a situation where he does not pay for and receive the documents of title. It may be that for such act of abandonment, action may be taken against him for suspension/cancellation of licence. May be, some other proceedings can also be taken against him. But certainly he cannot be treated as the owner of the goods even in such a case. Holding otherwise would place the exporter in a very difficult position; he loses the goods without receiving the payment and his only remedy is to sue the importer for the price of goods and for such damage as he may have suffered. This would not be conducive to international trade. We can well imagine situations where for one or other reason, an importer chooses or fails to pay for and take delivery of the imported goods. He

> just abandons them. (We may reiterate that we are speaking of a case where the import is not contrary to law). It is only with such a situation that we are concerned in this case and our decision is also confined only to such a situation. Condition (ii) in sub-clause (3) of Clause 5, in our opinion, does not operate to deprive the exporter of his title to said goods in such a situation."

19. As a result of the discussions aforesaid, this petition must succeed and it is therefore allowed. The impugned orders dated 14.12.98 (Annexure H) and cumulatively marked as (Annexure G) dated 16.2.99, 17.2.99, 1.3.99 and 8.3.99 of confiscation of the imported goods are all hereby quashed. The respondent authorities are directed to restore the goods seized and illegally confiscated to the petitioner company. It is however made clear that the Custom Authorities are at liberty to make further investigation into the alleged illegal import of the quantity of Raw Silk by the petitioner company and take permissible action in that regard. It is however also made clear that as a result of restoration of the illegally confiscated goods to the petitioner company, the Custom Authorities would consider the prayer of the petitioner company, based on its investigation and inquiry, to either allow the petitioner company to dispose of its goods to other licenced importers in India or to re-ship them, as is permissible in law. Rule is made absolute with no order as to costs.

(D.M.Dharmadhikari, CJ)

(A.R.Dave, J)

On behalf of the Union of India, Learned Counsel prays for stay of our order to enable the Department to approach the Supreme Court in appeal. Since on our order, some further action is contemplated, we do not think it proper to stay the order. The Ld. Counsel appearing for the petitioner state that this Court should fix some reasonable time limit for the Department to take action. It is directed that necessary action be taken within the outer limit of two months.

(D.M.Dharmadhikari, CJ)

(A.R.Dave, J)

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